Supreme Court, U.S.
FILED
98 741 NOV 4 - 1998
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1998

DUANE GORDON BIXLER,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Minnesota

PETITION FOR WRIT OF CERTIORARI

MARK D. NYVOLD
Counsel of Record
46 East 4th St.
Suite 1030
St. Paul, Minnesota 55101
(651) 223-5175

Counsel for Petitioner

Member of the Bar
of this Court

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

52 pp

QUESTION PRESENTED

Did the trial court abuse its discretion and deny Petitioner his Constitutional right to present a defense when it refused to allow him to present to the jury expert testimony about disabilities that make him particularly susceptible to pressure and coercion, and thus likely to involuntarily and falsely incriminate himself?

PARTIES TO THE PROCEEDING

State of Minnesota

Duane Gordon Bixler

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 9

CONCLUSION 16

APPENDIX A (MINNESOTA SUPREME COURT OPINION AND JUDGMENT TO BE REVIEWED) ..... App. 1

APPENDIX B (MINNESOTA COURT OF APPEALS OPINION) ..... App. 10

APPENDIX C (POST-CONVICTION COURT FINDINGS OF FACT, ORDER, AND MEMORANDUM OF LAW) ..... App. 22

TABLE OF AUTHORITIES

Page

CASES

Chapman v. California, 386 U.S. 78 (1967) 9

Crane v. Kentucky, 476 U.S. 683 (1986) 7, 9, 11, 12

State v. Knaffla, 243 N.W.2d 737 (Minn. 1971) 6

United States v. Hall, 93 F.3d 1337 (7th Cir. 1996) 12, 13

United States v. Nunn, 940 F.2d 1148 (8th Cir. 1991) 13

U.S. CONSTITUTION

Amendment VI 1, 8, 9, 11

Amendment XIV 2, 8, 9, 11

MINNESOTA STATUTES

609.101, subd. 2 (1994) 2

609.342, subd. 1(a) (1994) 2

609.342, subd. 2 (1994) 2

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Duane Gordon Bixler, petitions for a Writ of *Certiorari* to review the judgment of the Supreme Court of the State of Minnesota in this case.

OPINIONS BELOW

The opinion of the Minnesota Supreme Court, which is the one sought to be reviewed, is reported at 582 N.W.2d 252 (Minn. 1998). (See Appendix A, *post*, at App. 1). The opinion of the Minnesota Court of Appeals, the first appellate court to consider this case, is reported at 511 N.W.2d 43 (Minn. App. 1994). (See Appendix B, *post*, at App. 10).

JURISDICTION

The Minnesota Supreme Court entered its judgment on August 6, 1998 (See Appendix A, *post*, App. 1). This Petition is filed within 90 days of this date.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT VI

In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses

in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV

No State . . . shall deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

This case arises from a judgment and sentence of the Hennepin County District Court, the Honorable Tanya Bransford, presiding, convicting Petitioner of one count of first-degree criminal sexual conduct under Minn. Stat. 609.342, subd. 1(a), subd. 2 (1994), and 609.101, subd. 2 (1994), after a jury trial.

On March 9, 1994, Petitioner's wife reported to the police that Petitioner had sexually abused their two-year old daughter, S.B. S.B. has Downs Syndrome. When the police arrived at their residence, Mrs. Bixler gave the police what she believed to be a scab from Petitioner, which she said she had found in S.B.'s genital area when she changed her diaper at 8:00 a.m. that morning. She told the police that her husband was mentally retarded because of a brain injury, and acted like a 15- or 16-year old. Petitioner told the police officer he did not do anything wrong.

The responding officer noticed a fresh scar on Petitioner's neck. Mrs. Bixler told the officer that Petitioner had the habit of picking his scabs and putting them in his

mouth. Petitioner later told the police he had recently had scabs on his body because of skin graft surgery related to severe burns he received when he was five months old, but that the scabs were gone by March 9. The police officer did not arrest Petitioner but took the scab with him.

Laboratory testing of the scab-like substance did not disclose any blood, and DNA analysis did not link it to Mr. Bixler. However, the DNA testing did show that cells from S.B. were present in or on the scab-like substance. This did not mean the scab came from her because if it was actually in her genital area it could have picked up some of her skin cells.

A police detective later that day called Mrs. Bixler to set up an interview. Petitioner drove her to the police station, where Mrs. Bixler told the police she thought Petitioner had performed oral sex on S.B. She also told the police about Petitioner's scab. When Petitioner returned to pick up his wife, a detective asked Petitioner if he would talk to him. Petitioner agreed to answer some questions.

Shortly after the questioning began, the detective advised Petitioner of his *Miranda* rights, which Petitioner waived. The detective repeatedly questioned Petitioner as to whether or not he had sexually abused his daughter, but over the next hour Petitioner repeatedly denied he had done this. The detective got Petitioner to admit he had a problem with sexual abuse and drugs, and that to get help for these problems he first had to admit he had sexually abused S.B. Petitioner then admitted he had licked S.B.'s vagina, and had done so because his wife

would not have sex with him. The detective then gave Petitioner another *Miranda* advisory, repeated the interrogation, and this time got the answers recorded on tape.

The transcript of the taped portion of the interrogation reveals that the following questions and answers occurred during the taped interview:

Q: [By Det. Huntington] Alright, we've been talking to you for a long time here, is that correct?

A: [By Mr. Bixler] Yeah, about an hour.

Q: Okay and you're afraid of going to jail?

A: Yep.

Q: Doing more time, right?

A: Yep.

Q: But you know you've got a problem?

A: Yeah, I got a problem

Q: And it's a big . . .

A: Got a couple of problems.

Q: A couple of problems, right.

A: Drugs is one of them.

Q: Yeah, what's the other one?

A: Child molestation.

Q: Yeah, okay, and you're willing now to get help for that?

A: [By Mr. Bixler] Yes, I am.

Q: In order for you to do that, you've got to tell us what happened, do you understand that?

A: Yes, I do.

(R. 35).[1] Respondent at this point began confessing to abusing S.B.

At the pre-trial suppression hearing, the detective who interrogated Petitioner admitted he had little experience interviewing mentally challenged persons, and admitted he had exerted pressure on Petitioner to persuade him to confess. Petitioner testified he was 31 years old, had a ninth grade education, and had sustained a brain injury from a car accident in 1981.

Petitioner testified that even though during his interrogation he repeatedly denied having abused S.B., the detective told him that he was in denial and could not get treatment unless he admitted he had molested S.B. Petitioner said he then admitted to the abuse allegations his wife had made because he thought it was the only way he could get treatment. He also said that he could not stand the pressure of being asked the same questions about abuse over and over, at least six times by his count. Petitioner thought the interview would never end unless he admitted the abuse.

Defense counsel sought to call at the pre-trial hearing Dr. Ken Perkins, a psychologist, to testify that because of Petitioner's low I.Q. and personality deficits, he is susceptible to coercion. The trial court ruled that Petitioner's challenge at trial to the weight and reliability of his pre-trial statement could not include the testimony of Dr.

---

[1] "R." refers to the transcript of the pre-trial *Rasmussen* suppression hearing.

Perkins concerning Petitioner's physical and mental disabilities and how they made him especially susceptible to suggestion and pressure. The court decided that Petitioner's mental state and perceptions were not relevant, and that Petitioner was trying to re-litigate the voluntariness of his statement, which the court believed was a legal issue that had already been determined prior to trial.

Petitioner did not file a direct appeal. Minnesota caselaw however does not require a defendant to seek review of his conviction only by means of a direct appeal. *State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976). Minnesota allows a defendant to vindicate his right to one review of his conviction through the post-conviction process, and this is the method Petitioner elected for review of his conviction. *Knaffla, id.*

The trial court, sitting as the post-conviction court, adopted its earlier ruling excluding Dr. Perkins' testimony. The Minnesota Court of Appeals reversed, holding that Petitioner's Constitutional right to present a defense required the trial court to allow Petitioner to present competent expert evidence demonstrating his susceptibility to coercion, since such evidence could have been crucial to the jury's determination of the reliability of Petitioner's confession.

The Minnesota Supreme Court reversed the Court of Appeals and reinstated Petitioner's conviction, holding that the trial court was well within its discretion in ruling that the jury, without the testimony of the psychological expert Petitioner wanted to present, was fully capable of observing and understanding Petitioner's propensity to

please authority figures, and taking those observations into account in evaluating his confession.

The record created in the trial court and in subsequent proceedings in the Minnesota appellate courts makes clear that Petitioner raised in those forums the Constitutional denial-of-a-defense-claim upon which he now premises his request for the Writ. We elaborate below.

Defense counsel in a pre-trial proffer at the suppression hearing on Mr. Bixler's confession presented what the defense expert, Dr. Perkins, would have testified to (R. 61-66, 90). Counsel renewed this proffer at trial in connection with the defense request that the jury hear this evidence in assessing the reliability of Mr. Bixler's confession (T. 19-22, 175-76, 269-70).[2] Counsel for Petitioner specifically stated at pages 19-22 of the trial transcript that Dr. Perkins' testimony was necessary to let the jury know the circumstances surrounding the making of the confession, and cited this Court's decision in *Crane v. Kentucky*, 476 U.S. 683 (1986), which requires that a criminal defendant be given a fair opportunity to present a defense and in particular be allowed to present evidence surrounding the circumstances of his confession.

In the Minnesota appellate courts Petitioner again raised his Constitutional due process, fair-trial, and right-to-present-a-defense claims. The opinion of the Minnesota Court of Appeals, the first appellate court to hear Petitioner's case, acknowledged that Petitioner had been denied his right to present a defense because the trial

---

[2] "T." refers to the trial transcript.

court had prevented Dr. Perkins from testifying (App. 18-19, App. 20-21). The Minnesota Supreme Court likewise acknowledged that Petitioner's argument concerning Dr. Perkins' testimony raised an issue of Federal Constitutional dimension, specifically, that Petitioner was claiming that he had been denied his rights under the Sixth and Fourteenth Amendments of the United States Constitution guaranteeing him the right to present a defense (App. 7-8).

Dr. Ken Perkins would have testified that Mr. Bixler is vulnerable to suggestion, intimidation, and pressure, and that at such times he does not think clearly. These personality deficits result, according to Dr. Perkins, from Mr. Bixler's border-line retarded I.Q. of 77, and his psychological make-up and personality, which can be summarized as child-like with features of immaturity, inadequacy, significant need for social approval, low self-esteem, and a tendency toward literal thought. Dr. Perkins believes that because of these deficits that Mr. Bixler, when confronted with an authority figure, says what he believes the authority figure wants to hear in order to please him or her, or to avoid the pressure related to such a confrontation (R. 61-66).

What Dr. Perkins would have testified to about Mr. Bixler's I.Q., his vulnerability to suggestion and intimidation, and his need to please authority figures, did not come into evidence through other witnesses, and no other experts testified for the defense.

REASONS FOR GRANTING THE WRIT

A defendant is entitled under the Sixth and Fourteenth Amendments to the Federal Constitution to present a meaningful defense. *Crane v. Kentucky, id.* Denial of a Constitutional right requires reversal unless it was harmless error beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 23 (1967).

The State in this appeal sought to cast the issue as one of allowing the defense to present expert testimony of a "syndrome" that causes a person to falsely confess based on a desire to "please others," and asserted that allowing such evidence had no support at law. The State further contended that this evidence amounts to the defense expert telling the jury how to decide the case.

The State is not correct. The defense did not try to present syndrome evidence, only testimony establishing the "physical and psychological environment that yielded the confession," see, *Crane v. Kentucky, id.*, at 689, which Petitioner had a Constitutional right to do. *Id.* The State could not refute that this testimony was Constitutionally required to be admitted, as it was crucial evidence on the question of the reliability of Mr. Bixler's confession, especially since reliability is ultimately a jury question. We elaborate below on the actual basis and effect of the trial court's ruling.

a. Content of the excluded testimony

Defense counsel in a pre-trial proffer at the suppression hearing on Mr. Bixler's confession presented what the defense expert, Dr. Perkins, would have testified to

(R. 61-66, 90). Counsel renewed this proffer at trial in connection with the defense request that the jury hear this evidence in assessing the reliability of Mr. Bixler's confession (T. 19-22, 175-76, 269-70). Dr. Ken Perkins would have testified as stated above in the Statement of the Case to this Petition.

b. Analysis of State's arguments

The State's arguments about the inadmissibility of Dr. Perkins' testimony cannot be accurately evaluated without first pointing out two significant errors of law the State and the trial court made when they argued/ ruled that Dr. Perkins could not testify for the defense.

The first occurred when the trial court ruled that Dr. Perkins could not testify before the jury because his testimony would go to "the internal workings of the defendant's mind," and that case law concerning voluntariness focuses on external factors, such as the "length of the interrogation . . . [and] the number of people that were there" (T. 178, 273). Petitioner, however, was not challenging at trial the voluntariness of his confession, but its reliability and the weight to be given it. There is no question that a defendant's state of mind, *e.g.*, ability to comprehend, is a relevant factor in deciding the jury question of the confession's reliability.

The second error the trial court made occurred when it ruled that Dr. Perkins' proffered testimony went to the issue of voluntariness, and that this issue should not even be presented to the jury (T. 178). Defense counsel repeatedly stated that he was not trying to re-litigate the pre-

trial voluntariness issue but only present evidence going to the reliability of the confession independent of the pre-trial ruling on voluntariness, as the defense was entitled to do under *Crane v. Kentucky, id.*, at 688-91 (T. 19-20).

Because the trial court erroneously believed that internal, psychological factors peculiar to Petitioner and his subjective state of mind were not admissible on the question of reliability of the confession, and because it even more erroneously believed that Petitioner could not even argue reliability and truthfulness of his confession to the jury after voluntariness had already been litigated, the trial court made an error of Constitutional dimension in its ruling excluding Dr. Perkins' proffered testimony.

In *Crane v. Kentucky, id.*, this Court considered a State court ruling that prevented Crane from introducing evidence to the jury about the coercive circumstances under which he confessed. The State objected to this evidence because the trial court had already ruled as a matter of law that Crane had voluntarily confessed, and that this issue could not be re-litigated before the jury. 476 U.S. at 686. The trial court agreed with the State. This Court, however, said that a defendant's right to present a meaningful defense, which arises under the Sixth and Fourteenth Amendments, requires an opportunity to present evidence to the jury on the "physical and psychological environment that yielded the confession." *Id.* at 689-90.

Crane holds that if a defendant cannot argue to the jury from "the circumstances that prompted his confession" the confession's untruthfulness and unreliability then

> . . . he is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?

Id. at 689.

No legal or factual reason exists to dispute that *Crane*'s reference to "the circumstances that prompted the confession" cannot include psychological factors pertinent to a defendant. This is especially true in light of *Crane*'s statement that a defendant's opportunity to be heard would be an empty one

> if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence.

Id. at 690.

Hence, *Crane v. Kentucky* does not limit the defense to presenting evidence only of objectively determinable or observable facts to show that the circumstances surrounding a defendant's confession make it unworthy of belief.

Two Federal cases buttress our argument that *Crane* required the trial court to let the defense present Dr. Perkins' testimony. In *United States v. Hall*, 93 F.3d 1337, 1341 (7th Cir. 1996), a case involving evidence presented to a jury on the reliability of the defendant's confession, the trial court allowed the jury to hear evidence from experts to support the defense contention that because of a personality disorder, the defendant was susceptible to suggestion, and pathologically eager to please. Specifically, the court allowed testimony from a psychologist

about Hall's mental condition (attention-seeking behavior and high level of suggestibility), and the psychologist's opinion that Hall could be easily led. *Id.*

What is really significant about *Hall*, however, is that even though the defendant was able to offer considerable expert testimony to the jury to explain why his confession was not reliable, the Seventh Circuit reversed his conviction because the trial court improperly excluded other expert testimony relevant to Hall's claim that he involuntarily confessed. The Seventh Circuit ruled that the court should have allowed a psychologist to testify about the phenomenon of false confessions and should have also allowed a psychiatrist to testify about Hall's susceptibility to various interrogation techniques and his propensity to give a false confession. *Id.* at 1345.

The Eighth Circuit in *United States v. Nunn*, 940 F.2d 1148, 1149 (8th Cir. 1991) held that the expert testimony of a psychiatrist or psychologist is admissible to prove a defendant's unusual susceptibility to inducement in connection with a claim of entrapment. The defendant's expert in *Nunn*, however, was not allowed to testify because he never showed how the defendant's being unable to say no to his drug-dealing father's requests to assist him established that he was susceptible to inducement. Therefore, the otherwise-admissible psychological testimony had no relevance in this case. That is not true in Mr. Bixler's case because Dr. Perkins would have testified that his psychological deficits were directly related to his need to avoid pressure and to say what he thinks an authority figure wishes to hear.

c. Minnesota Supreme Court ruling

The Minnesota Supreme Court reversed the Court of Appeals' decision because it determined that under Minnesota Rule of Evidence 702, Dr. Perkins' testimony would not be helpful to the jury because the jury was capable of observing and understanding Petitioner's propensity to please authority figures, and of taking those observations into account in evaluating his confession. The Supreme Court said that under Rule 403 the trial court was clearly within its discretion in excluding Dr. Perkins' testimony.

This analysis begs the question, *i.e.*, it assumes as true the very point to be proven. The jury did not have the ability to observe and understand personality and intelligence deficits based just on seeing Mr. Bixler in court and hearing him testify. His deficits could not possibly have been understood to the extent they made him susceptible to suggestion and the extent to which his mental and intellectual impairments created the likelihood of a false confession. This is why expert testimony was required to permit Mr. Bixler to exercise his Constitutional right to a defense.

d. Prejudicial effect of trial court's ruling

Dr. Perkins' testimony would have provided crucial evidence to allow the jury to answer the all-important question that the Supreme Court recognized in *Crane v. Kentucky* always arises in cases such as Petitioner's: "If the defendant is innocent, why did he previously admit his guilt?" 476 U.S. at 689. It was especially important for

the jury to know why Petitioner confessed because practically no evidence of Petitioner's guilt exists independently of his confession.

Furthermore, because Petitioner testified at trial that he confessed after the sixth time Det. Huntington accused him of sexually abusing his daughter (T. 285), which may not seem like an inordinate amount of questioning, it was important for the jury to know what it was about Petitioner's psychological make-up (*e.g.*, his susceptibility to suggestion and intimidation, and his desire to please authority figures) that made his confession unreliable.

Furthermore, in assessing the harmless error and prejudice issues, this Court should be aware that excluding Dr. Perkins' testimony became *more* prejudicial as Petitioner's trial went on. Defense counsel twice renewed at trial his request to present this testimony because the evidence the State was presenting about Petitioner's mental capabilities made increasingly relevant Perkins' testimony about why Petitioner would confess to something he did not do.

For example, after the State presented evidence from Petitioner's ex-wife that Petitioner was not mentally impaired but understands the way an adult would (which was contrary to her pre-trial statements), the defense renewed its motion to admit Dr. Perkins' testimony (T. 86, 175). The defense again renewed its motion when the State presented testimony from Detective Huntington that Petitioner said during the interrogation that he did not feel he had mental disabilities, had obtained a G.E.D., and that Petitioner understood the interrogation (T. 236, 270). Even if Dr. Perkins' testimony was not admissible at

the outset of trial, in light of the evidence the State presented to the jury, it certainly became admissible to answer the State's evidence.

CONCLUSION

Because precluding Dr. Perkins' testimony denied Petitioner his Constitutional right to present a meaningful defense, it was not harmless error beyond a reasonable doubt. To the contrary, it was highly prejudicial error, especially since the confession was practically the only evidence that the State had against Petitioner. For the reasons stated above, Petitioner respectfully requests that this Court grant the Writ.

MARK D. NYVOLD
46 East 4th St.
Suite 1030
St. Paul, MN 55101
(651) 223-5175

Attorney for Petitioner

Member of the Bar of this Court

APPENDIX A

STATE OF MINNESOTA

IN SUPREME COURT

C5-97-181

Court of Appeals — Stringer, J.

Duane Gordon Bixler,

Respondent,

vs.

Filed: August 6, 1988
Office of Appellate Courts

State of Minnesota, pet.,

Appellant.

SYLLABUS

The trial court did not abuse its discretion in determining that psychological expert testimony was not admissible in assessing the credibility of a confession given by a mentally impaired defendant.

Reversed.

Heard, considered, and decided by the court en banc.

OPINION

STRINGER, Justice.

In this appeal brought by the State of Minnesota regarding respondent's petition for postconviction relief we consider whether the court of appeals erred in concluding that because respondent is borderline mentally retarded, his constitutional right to present a meaningful defense was violated when the trial court refused to

allow psychological expert testimony relating to the credibility of respondent's confession. We hold that the trial court did not abuse its discretion in excluding the expert testimony and therefore reverse the court of appeals.

On March 9, 1994, Lynne Bixler called the police and reported that her husband Duane Bixler had sexually abused their 2-1/2-year-old daughter, S.B., a child with Downs Syndrome. When the police arrived at the Bixler residence, Lynne Bixler handed the officer a plastic bag containing what she believed to be a scab from her husband. She told the police that she found the scab between S.B.'s clitoris and labia when she changed S.B.'s diaper at approximately 8:00 a.m. that morning. She explained that her husband was mentally retarded due to a brain injury and acted like a 15 or 16-year-old. Duane Bixler knew his wife had called the police and entered the room while the officer was talking with his wife. He said that he did not do anything wrong. The officer noticed that Duane Bixler had a fresh scar on his neck that was shiny, dry and concave. Lynne Bixler later told the police and a social worker that Duane Bixler had a habit of picking at his scabs and putting them in his mouth. Duane Bixler later acknowledged to the police that he had scabs on his body from skin graft surgery 2 months earlier related to severe burns that he received when he was 5-years-old but he thought they were gone by March 9, 1994. The officer did not arrest Duane Bixler but took the bag containing the scab with him.

Later that day a police detective phoned Lynne Bixler to set up a time for an interview. Duane Bixler testified that his wife asked him to drive her to the police station so she could talk with the detective. When he returned to

pick her up, Lynne Bixler had just told the detective that she believed her husband had put one of his scabs in his mouth and then performed oral sex on their daughter S.B. Apparently based on this information the detective told Duane Bixler that he wanted to ask him a few questions. The detective interrogated Bixler in a room 14' x 16' in size, with a window looking out on the investigators' cubicles. The room was brightly lit by fluorescent lights and contained a table and some bookshelves. The interrogation lasted for little more than an hour with an 8-minute bathroom break. At the beginning of the interrogation, the detective asked Duane Bixler if he knew why he was there.[1] He responded that he did, but that he did not abuse S.B. Shortly after the interrogation began, the detective advised Bixler of his *Miranda* rights, which he then waived. For the next hour Bixler denied he sexually abused S.B. The detective counseled him that in order to get help for his problems related to his relationship with his wife, his abuse of drugs and his sexual abuse of S.B. he would have to first admit that he did it. At this point in the interrogation Bixler admitted that he had licked S.B.'s vagina. He told the detective that he did it because S.B. liked it and because his wife would not have sex with him. The detective then gave him another *Miranda* warning and tape-recorded his confession. The recording was transcribed, Bixler was given a copy and signed it after making several changes. The detective then placed him under formal arrest.

---

[1] The detective had spoken to Bixler a couple of months earlier regarding an allegation that a third party had sexually abused the Bixlers' 5-year-old daughter.

At the *Rasmussen* hearing, the interrogating detective testified that he had little experience interviewing mentally retarded individuals and acknowledged that he had exerted pressure on Bixler to persuade him to confess. Bixler testified that he was 31-years-old, had a 9th grade education, and had sustained a brain injury from a car accident in 1981. He also testified that during the interrogation, despite his repeated denial of abusing S.B., the detective told him that he was in denial and that he could not go into any kind of treatment unless he admitted that he was a child molester. He further testified that he admitted to abusing S.B. because he thought it was the only way he could get treatment, he was afraid of going to jail, he could not stand the pressure of being asked the same question over and over – "six times" and he thought the interview would never end unless he admitted that he abused S.B. Although Bixler acknowledged that he had been questioned by the police previously relative to a drug charge, he said that never before had he felt pressured by the police to admit anything. Regarding the present interrogation, in addition to questioning Bixler about S.B., the detective asked Bixler several questions in succession as to whether he sexually abused either his 5-year-old or 1-year-old daughter. When the prosecutor asked Bixler on cross-examination how he was able to resist admitting that he molested his youngest daughter, he responded that the detective did not pressure him as much about that daughter as he did about S.B.

Defense counsel then called Dr. Perkins, a psychologist, to the stand and in response to the state's objection that expert testimony of Bixler's personality characteristics is irrelevant, defense counsel made an offer of proof

that Dr. Perkins would testify that he examined Bixler and that because of his low intelligence he is susceptible to coercion. Defense counsel argued that his statement was therefore a product of coercion and was involuntary, and that Dr. Perkins would further testify that Bixler is vulnerable to suggestion and intimidation and has a tendency to say what authority figures want to hear in order to bring an end to the pressure he feels from persons in authority. The *Rasmussen* court applied a totality of the circumstances test and refused to permit Dr. Perkins to testify at the hearing, concluding that Bixler responded appropriately throughout the proceedings, he added explanation when he thought it was necessary, he had experience with the criminal justice system including prior convictions, incarceration, and numerous interviews with the police, he was familiar with his *Miranda* rights, he had a very good memory for detail, the interrogation was not long and was conducted in an appropriate environment at an appropriate time, he agreed to be interviewed, and there was no evidence of any maltreatment. *See Bixler v. State*, 568 N.W.2d 880, 883-84 (Minn. App. 1997) (describing the Rasmussen court's analysis). The *Rasmussen* court noted his mental impairments but found that they did not, in light of the other factors, make it impossible for him to give a voluntary confession. The *Rasmussen* court therefore rejected the offer of proof and concluded that Duane Bixler's confession was admissible.

On three occasions during Bixler's trial defense counsel again offered the testimony of Dr. Perkins regarding the reliability of Duane Bixler's confession. On each occasion the state objected arguing that he was attempting to

revisit the issue of voluntariness pertaining to admissibility. The trial court rejected the expert testimony as lacking foundation and irrelevant.

The jury found Bixler guilty of first-degree sexual misconduct under Minn. Stat. § 609.342, subd. 1(a), subd. 2, and § 609.101, subd. 2 (1994) and he was sentenced to 110 months in prison. Bixler did not file a direct appeal, and his petition for postconviction relief was denied on a ruling that Dr. Perkins' testimony was properly excluded regarding the pre-trial issue of voluntariness and the trial issue of credibility of the confession because the proffered testimony was "unrelated to the manner in which the confession was obtained." On appeal, the court of appeals affirmed as to the admissibility of the confession concluding that it was voluntary and that it was not error to exclude Dr. Perkins' testimony from the *Rasmussen* hearing, but disagreed with the trial court as to the exclusion of Dr. Perkins' testimony at trial regarding the credibility of Duane Bixler's confession. The court held that Bixler must be allowed to challenge the truthfulness of his confession at trial and competent expert evidence demonstrating that the defendant is susceptible to coercion was admissible as it may be important as to the jury's consideration of why he claims that he is innocent after having confessed to the crime. *Bixler*, 568 N.W.2d at 885. On this basis the court of appeals reversed and granted Duane Bixler a new trial. *Id.* We granted the state's petition for review and hold it was not an abuse of discretion for the trial court to determine that the psychological expert testimony was not admissible.

The Sixth and Fourteenth Amendments of the United States Constitution and Article I, section 7 of the Minnesota Constitution guarantee criminal defendants the right to present a meaningful defense. *See* U.S. Const. amends. VI, XIV; Minn. Const. art. I, § 7; *Crane v. Kentucky*, 476 U.S. 683 (1986); *State v. Richards*, 495 N.W.2d 187, 191 (Minn. 1992). The court of appeals relied heavily on *Crane v. Kentucky* in reaching its conclusion that the trial court had no discretion to exclude the expert witness testimony regarding Bixler's susceptibility to coercion. We disagree with the court of appeals' analysis of *Crane*. In *Crane*, the defendant was a minor who testified that the police badgered him into making a false confession when he was surrounded by as many as six police officers in a windowless room and interrogated for a long period of time while prohibited from telephoning his mother. 476 U.S. at 685. The United States Supreme Court reversed the Supreme Court of Kentucky distinguishing the pretrial issue of voluntariness of a confession from the trial issue of its credibility, and stated that "evidence about the manner in which a confession was secured will often be germane to its probative weight, a matter that is exclusively for the jury to assess." *Id.* at 687-88. Thus, "the physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence." *Id.* at 689. The Supreme Court's concern with the wholesale exclusion of evidence bearing on the credibility of the confession at trial is that:

> [S]tripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from

> answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?

Id. Although the Supreme Court concluded that the defendant was deprived of his constitutional right to present a complete defense in that case, *id.* at 687, it noted that judges have " 'wide latitude' to exclude evidence that is 'repetitive . . . , only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.' " *Id.* at 689-90 (citation omitted). The trial court's determination to exclude Dr. Perkins' testimony was precisely the "wide latitude" accorded in *Crane*.

Turning next to our rules of evidence, Rule 702 of the Minnesota Rules of Evidence governing the admissibility of expert testimony is consistent with the discretion accorded the trial court in *Crane*:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Minn. R. Evid. 702. We have recently held that the admissibility of expert testimony has generally rested in the discretion of the trial court and will not be reversed absent clear error. *State v. Koskela*, 536 N.W.2d 625, 629 (Minn. 1995). In *Koskela*, not unlike the matter now before us, we held that the trial court did not abuse its discretion in refusing to permit a psychologist to testify as to whether the defendant fit the profile of a schizoid personality disorder. *Id.* at 630. There, the defendant confessed

to breaking into a woman's apartment and stabbing her to death. *Id.* at 627. He claimed that he was denied his constitutional right to a fair trial when the trial court allowed a psychologist to testify as to the nature of the disorder that the defendant claimed affected the reliability of his confession, but did not allow the psychologist to testify as to whether the defendant was a victim of the disorder. *Id.* at 629-30. We held that to be a matter for the jury to determine and that the trial court was well within its discretion in excluding the testimony. *Id.*

Similarly Rule 403 of the Minnesota Rules of Evidence vests the trial court with broad discretion to exclude evidence, even though relevant, "if its probative value is substantially outweighed by the danger of unfair prejudice * * * or needless presentation of cumulative evidence." Our reluctance to reverse the trial court on an issue of admissibility of evidence of this nature is well illustrated by the offer of the psychological expert testimony in this case – testimony that was nothing more than a composite of personal characteristics that might render an individual more susceptible to wanting to please an authority figure, and having far less scientific specificity than the schizoid personality disorder in *Koskela*.

Clearly the trial court was well within its discretion in ruling that the jury, without the testimony of the psychological expert, was fully capable of observing and understanding Duane Bixler's propensity to please authority figures, and taking those observations and that understanding into account in evaluating his confession.

Reversed.

APPENDIX B

STATE OF MINNESOTA
IN COURT OF APPEALS
C5-97-181

Duane Gordon Bixler, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed September 16, 1997
Affirmed in Part, Reversed in Part,
and Remanded Davies, Judge

Hennepin County District Court
File No. 94019249

Hubert H. Humphrey III, Attorney General, 1400 NCL Tower, 445 Minnesota St., St. Paul, MN 55101 (for respondent)

Michael O. Freeman, Hennepin County Attorney, J. Michael Richardson, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Mark D. Nyvold, 386 North Wabasha St., Suite 654, St. Paul, MN 55102 (for appellant)

Considered and decided by Klaphake, Presiding Judge, Davies, Judge, and Foley, Judge.*

---

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

SYLLABUS

Although expert psychological evidence of a defendant's "susceptibility to coercion" need not be admitted at a pretrial hearing on the voluntariness – and admissibility – of a confession, such evidence is, on a proper foundation, admissible at trial.

OPINION

DAVIES, Judge.

Appellant Duane Bixler challenges the postconviction court's decision rejecting his arguments that his confession was involuntary and that, both at the ***Rasmussen*** hearing (on the admissibility of his confession) and at trial, the court should have allowed expert testimony concerning alleged psychological traits that reduced the credibility of his confession. We affirm in part, but reverse on the exclusion of expert testimony at trial. We remand for a new trial.

FACTS

In March 1994, appellant Duane Bixler agreed to be interviewed by police concerning his wife's allegations that he had sexually abused their two-and-one-half-year-old daughter. During the interview, Bixler confessed to the abuse. He was subsequently tried and convicted of first-degree criminal sexual conduct.

Bixler's claims on appeal concern the pretrial ruling that his confession was voluntary and admissible and the refusal of the judge at both the ***Rasmussen*** hearing and at

trial to allow introduction of expert psychological testimony concerning the voluntariness and truthfulness of his confession.

The confession interview, which followed a ***Miranda*** warning, was conducted in a 14-foot by 16-foot room with a window that looked out into the investigators' cubicles. The investigator testified at the ***Rasmussen*** hearing that Bixler's wife had informed him that Bixler, who was 30 years old at the time, had a permanent brain injury and acted childlike. The investigator testified that, although he spent a lot of time reiterating his questions because of the information he had about Bixler's mental capacity, he did not find Bixler to be "slow" or to have trouble understanding or answering questions.

The first hour of the interview was unrecorded. The investigator testified that, during this period, the two spent about one-third of the time discussing the abuse and the rest of the time discussing other topics, including Bixler's troubles with his wife and with drug use. The investigator admitted that his techniques exerted pressure on Bixler to confess. Eventually, Bixler admitted having had oral sex with his daughter. After his initial admission, Bixler agreed to give a recorded statement. The recorded statement was preceded by a second ***Miranda*** warning.

At the ***Rasmussen*** hearing, Bixler sought to exclude his confession. He argued that the taped transcript indicates that he was promised treatment for both drug use and child molestation in exchange for a confession and that the confession was, therefore, impermissibly coerced. He also asked the court to admit expert evidence from a

psychologist who would testify that Bixler has a tendency to try to "please the authority figure" or to "relieve any perceived threat from the authority figure" by saying "what the authority figures want to hear," and that, because of his mental impairments, Bixler is "susceptible to coercion and * * * that [his confession] is a product of coercion and is involuntary."

The *Rasmussen* court refused to admit the expert testimony, ruling that the testimony was unnecessary to an inquiry concerning the totality of the circumstances of the confession. It also ruled that there was no coercion in the discussion of treatment during the interview. After considering numerous factors bearing on the issue of voluntariness, the *Rasmussen* court ruled that the confession would be admissible at trial.

At trial, Bixler again sought to admit the testimony of the expert; the trial court also excluded the testimony.

Bixler, having been convicted of first-degree criminal sexual conduct, now challenges the *Rasmussen* court's admission of his confession and its decision not to consider his expert's testimony. He also challenges the trial court's decision not to let the jury hear the expert's testimony.

ISSUES

I. Did the *Rasmussen* court err by ruling that the investigator's statement (that Bixler needed to confess in order to get treatment) did not make the confession involuntary and inadmissible?

II. Did either the *Rasmussen* or trial court err by refusing to admit expert testimony on the voluntariness of Bixler's confession?

ANALYSIS

The state must prove by a preponderance of the evidence that a defendant's statement was made voluntarily. *State v. Thaggard,* 527 N.W.2d 804, 807 (Minn. 1995) (citing *Doan v. State,* 306 Minn. 89, 91, 234 N.W.2d 824, 826 (1975)). In determining whether a statement is voluntary, the court must look at the totality of the circumstances. *State v. (Kevin) Anderson,* 298 N.W.2d 63, 65 (Minn. 1980).

> These factors include the defendant's age, maturity, intelligence, education, experience and ability to comprehend; the lack of or adequacy of a warning; the length and legality of the detention; the nature of the interrogation; and whether the defendant was deprived of physical needs or denied access to friends.

Thaggard, 527 N.W.2d at 808 (citing *State v. Jungbauer,* 348 N.W.2d 344, 346 (Minn. 1984)).

> The appellate court is not bound by the trial court's determination of whether or not the confession was voluntary. Rather, its duty is "to independently determine, on the basis of all factual findings that are not clearly erroneous, whether or not the confession was voluntary."

Id. at 807 (quoting *State v. (Howard) Anderson,* 396 N.W.2d 564, 565 (Minn. 1986)).

I. Promise of Treatment

Bixler claims that he was promised treatment in exchange for a confession. He points in particular to the following exchange in his recorded statement:

Q: But you know you've got a problem?

A: Yeah I got a problem.

Q: And it's a big . . .

A: Got a couple of problems.

Q: A couple problems, right.

A: Drugs is one of them.

Q: Yeah, what's the other one?

A: Child molestation.

Q: Yeah, okay. And you're willing now to get help for that?

A: Yes I am.

Q: In order to do that, you've got to tell us what happened, you understand that?

A: Yes I do.

Bixler also alleges that during the earlier, unrecorded portion of the interview, the investigator told him that he had to admit that he was a child molester before he would be able to receive any kind of treatment (i.e., for chemical dependency). The investigator admitted that his statements implied that Bixler would need to admit to the crime if he was going to get treatment.

Although our case law has expressed disapproval of the use of promises to elicit confessions, we "do not

mechanically hold confessions involuntary just because a promise has been involved." *State v. Slowinski,* 450 N.W.2d 107, 112 (Minn. 1990) (quoting *(Kevin) Anderson,* 298 N.W.2d at 65). Rather, the use of promises is simply a part of the totality-of-the-circumstances inquiry. *Thaggard,* 527 N.W.2d at 811; *Slowinski,* 450 N.W.2d at 112.

In *Thaggard,* the court affirmed a trial court's ruling that a statement was voluntary even though the defendant had been led to believe that he would receive treatment if he confessed. 527 N.W.2d at 811-12. The court discussed the other factors involved, including the fact that he understood the *Miranda* warning, had prior experience with the criminal justice system, had been interrogated in the afternoon for a relatively short time, was interrogated by only one officer, was allowed to take a break and to use the bathroom when necessary, did not claim he was intoxicated, and did not claim that he was threatened or physically intimidated. *Id.* at 812. The court stated that the "key fact" was the absence of any "indication that defendant was led to believe that he would not be prosecuted * * * if he confessed." *Id.*

The *Rasmussen* court here made similar findings under the totality-of-the-circumstances test. In sum, the court found that: (1) Bixler responded appropriately throughout the proceedings; (2) he added explanation when he thought it was necessary; (3) he had experience with the criminal justice system including prior convictions, incarceration, and numerous interviews with

police;[1] (4) he was familiar with his *Miranda* rights; (5) he had very good memory for detail; (6) the interrogation was not long and was conducted in an appropriate environment at an appropriate time; (7) he agreed to be interviewed; and (8) there was no evidence of any maltreatment. The court noted his mental impairments but found that they did not, in light of the other factors, make it impossible for him to give a voluntary confession. As to the alleged promises, the court found that Bixler himself brought up the topic of treatment, that the conversations did not appear to be more than conversations, and that they were appropriate in the context of the interview. The court also noted that Bixler never recanted and made several written corrections to his statement. There is no indication that he was led to believe that he would not be prosecuted; he himself at the end of the interview acknowledged that he should probably go to jail for his conduct.

We hold that the promise of treatment in this case did not render the confession involuntary and affirm that decision by the *Rasmussen* court.

---

[1] The *Rasmussen* court mistakenly stated on the record that Bixler had, as a suspect, been interviewed two months earlier. Bixler had spoken with the same investigator two months before, but the interview concerned allegations of abuse by a different person. This error does not affect our ultimate decision; the thrust of the court's finding was that the investigator was familiar with Bixler and his mental abilities and that Bixler had significant experience with the criminal justice system.

II. Expert Evidence on Susceptibility

Bixler argues that expert evidence concerning his susceptibility to coercion should have been admitted both at the *Rasmussen* hearing and at trial.

In *State v. Orscanin*, 283 N.W.2d 897, 899 (Minn. 1979), in discussing an omnibus court's decision that a confession was voluntary, the supreme court described the inquiry as follows:

> Whether defendant's confession was voluntary turns on a ***determination of defendant's state of mind*** at the time of the confession. ***Was defendant subjectively induced*** to confess or was his confession the product of a free-will decision? We must review the facts surrounding the confession, determine how defendant reacted to these external facts, and decide the legal significance of how he reacted.

(Emphasis added.) Bixler argues that the emphasized language suggests that the inquiry is subjective, allowing consideration of expert testimony concerning his psychological make-up and his susceptibility to coercion. Bixler, however, cites no case requiring that such testimony be admitted at a pretrial *Rasmussen* hearing.

There is, however, case law suggesting that such evidence is admissible at trial.

> [I]f the trial court admits the confession, the trial court "must permit the jury to hear evidence on the circumstances surrounding the making of the confession * * * for a determination of weight and credibility * * * ."

State v. Schaeffer, 457 N.W.2d 194, 196 (Minn. 1990) (quoting *State v. Wajda*, 296 Minn. 29, 31, 206 N.W.2d 1, 2 (1973)). The *Schaeffer* court discussed *Crane v. Kentucky*, 476 U.S. 683, 688-91, 106 S. Ct. 2142, 2145-47 (1986), which held that a defendant was denied his right to present a defense if prohibited from presenting "evidence about the physical and psychological environment in which the confession was obtained." *Schaeffer*, 457 N.W.2d at 196. *Crane* stated that, if the jury cannot hear such evidence,

> the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?

476 U.S. at 689, 106 S. Ct. at 2146. *Crane* noted that this issue is "entirely independent" of the voluntariness issue. *Id.*

While these cases do not necessarily mean that expert testimony on something such as a defendant's "susceptibility to coercion" would be admissible, *State v. Koskela*, 536 N.W.2d 625 (Minn. 1995), does suggest so. In *Koskela*, the defendant wanted to admit expert evidence that he suffered from a psychological disorder, which he claimed affected the reliability of his confessions. *Id.* at 629. The supreme court affirmed the trial court's ruling that the defendant's expert could testify about the nature of the disorder but that it was for the jury to decide whether the defendant suffered from it.[2] *Id.* at 630. Although not directly addressing the issue before us, *Koskela* does suggest that expert testimony could be

---

[2] Because of the limitation, the defense in *Koskela* decided not to present the expert evidence. *Koskela*, 536 N.W.2d at 630.

related to the reliability or truthfulness of a defendant's confession and, therefore, be admissible.

Bixler also cites to ***United States v. Hall***, 93 F.3d 1337, 1341, 1345-46 (7th Cir.1996), in which the Seventh Circuit Court of Appeals reversed a conviction, in part because of the trial court's exclusion of expert psychological testimony on the defendant's mental condition (one that made him likely to give the answers he thought the interrogators wanted) and on the phenomenon of false and coerced confessions generally. (***Hall***, interestingly, affirmed the admission of the confessions themselves as voluntary under a totality-of-the-circumstances test, noting that the interrogators did not know of the defendant's mental condition. ***Id.*** at 1346.)

After considering all of this case law, we hold that Bixler's expert evidence should have been allowed at trial, although its exclusion at the ***Rasmussen*** hearing was not error. In our view, the pretrial determination of voluntariness should focus on the conduct of the police, any external evidence of the defendant's subjective reaction, and objective evidence about the defendant's reaction and state of mind. But to admit expert psychological evidence concerning "susceptibility to coercion" should be discretionary when the determination resolves only the admissibility question, not guilt.

At trial, however, the defendant must be allowed to challenge the confession's truthfulness by presenting competent expert evidence demonstrating such "susceptibility to coercion"; that evidence may be crucial to the jury's consideration of why the defendant asserts innocence after having confessed. Based on the decision to

prohibit Bixler from introducing the expert testimony at trial, we reverse the conviction.

We note that the defense never qualified the witness as an expert. It may be that, after an attempt to qualify the expert, the trial court would decide that the expert could not provide "scientific * * * knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue." Minn. R. Evid. 702. That issue must be addressed on remand.

DECISION

The *Rasmussen* court did not err in excluding Bixler's expert evidence on his "susceptibility to coercion" and properly found that his confession was voluntary. The trial court erred, however, by excluding that expert evidence at trial. Bixler is entitled to a new trial at which he must be allowed to present to the jury any qualified expert evidence on the issue of his susceptibility to coercion.

Affirmed in part, reversed in part, and remanded.

/s/ Jack Davies
Judge Jack Davies
September 4, 1997

APPENDIX C

STATE OF MINNESOTA COUNTY OF HENNEPIN	DISTRICT COURT FOURTH JUDICIAL DISTRICT

Duane Gordon Bixler, Petitioner, v. State of Minnesota, Respondent.	**FINDINGS OF FACT, ORDER AND MEMORANDUM OF LAW** SIP No. 940[illegible]9249 C.A. No. 94-0733 (Filed Jan. 9, 1997)

The above entitled matter came on for hearing before the Honorable Tanya M. Bransford on October 10, 1996 in the Hennepin County District Court, Minneapolis, Minnesota pursuant to Petitioner's Motion for Post Conviction Relief.

Petitioner was represented by Frederick J. Goetz, Esq., 2124 Dupont Ave. S., Minneapolis, MN 55405, Respondent was represented by Catherine Quaintance, Assistant Hennepin County Attorney.

On reviewing all files and records herein, briefs, letters, and oral argument of counsel, the Court makes the following:

FINDINGS OF FACT

1. On March 11, 1994, Petitioner was charged with first degree criminal sexual conduct, in violation

of Minn. Stat. § 609.342, Subd. 1(a), Subd. 2; § 609.101, Subd. 2.

2. In a *Rasmussen* hearing before the Honorable J. Katherine Anderson in Hennepin County on October 18, 1994, Petitioner's confession was held admissible.

3. Petitioner appeared before the undersigned in Hennepin County on the charge of first degree criminal sexual conduct and was found guilty by a jury on April 17, 1995.

4. On July 10, 1995, this Court sentenced Petitioner to 110 months in prison. Under the Minnesota Sentencing Guidelines, this is the presumptive sentence for a defendant with a criminal history score of 2 and for an offense of severity level VIII.

5. Petitioner filed a Petition for Post-Conviction Relief seeking the vacation of the petitioner's conviction or alternatively that the conviction should be overturned due to insufficiently of the evidence. Petitioner initially claims that his confession was not voluntary and should not have been admissible at trial. Petitioner also claims that rulings regarded admissibility of evidence and jury instructions should require that petitioner's conviction be vacated or overturned.

IT IS HEREBY ORDERED:

1. Petitioner's request that his conviction for first degree sexual conduct be overturned and the case set for a new trial is denied.

2. Petitioner's alternative request that his conviction be overturned on the grounds of insufficiency of the evidence is denied.

3. The attached memorandum is incorporated herein by reference.

BY THE COURT

Dated: January 9, 1997 /s/ Tanya M. Bransford
Judge Tanya M. Bransford
District Court Judge
Fourth Judicial District

MEMORANDUM

A. Evidentiary rulings.

1. Petitioner's confession was voluntary and thus admissible at trial.

In his petition for post-conviction relief, Petitioner argues that because of his state of mind at the time of the confession, the confession was not voluntary. *State v. Orscanin*, 283 N.W.2d 897, 899 (Minn. 1979), *cert. denied*, 100 S. Ct. 464 (1979). To decide on the purely legal question of the voluntariness of a confession, Minnesota, like most states, assigns the trial judge alone to make the determination. *State v. Schaeffer*, 457 N.W.2d 194, 196 (Minn. 1990). The trial court follows the preponderance-of-the-evidence standard to determine the voluntariness and admissibility of the confession. *State v. Wajda*, 296 Minn. 29, 30, 206 N.W.2d 1, 2 (Minn. 1973). "The true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort." *State v. Biron*, 266 Minn. 272, 282, 123 N.W.2d

392, 399 (Minn. 1963), *quoting Haymes v. Washington*, 373 U.S. 503, 513, 83 S. Ct. 1336, 1343 (1963).

To determine whether a confession was made in such a manner, courts have consistently considered the totality of the circumstances bearing on voluntariness. *State v. Andrews*, 388 N.W.2d 723, 730 (Minn. 1986). These circumstances include "the age, maturity, intelligence, education, and experience of the defendant and the ability of the defendant to comprehend; the lack of or adequacy of warnings; the length and legality of the detention; the nature of the interrogation; whether the defendant was deprived of any physical needs; and whether the defendant was denied access to friends." *State v. Jungbauer*, 348 N.W.2d 344, 346 (Minn. 1984).

In *Orscanin* also the court noted that the "totality of relevant circumstances" should be considered in determining the voluntary character of a confession. 283 N.W.2d at 899. In that case the defendant was eighteen years old and had completed the tenth grade. Pending this confession, he was placed at the Red Wing Training School in a lockup about six feet by nine or ten feet in size. The room contained only a bed, and defendant was allowed out only to take a shower and to use the toilet. He was not allowed a radio, television, or any form of recreation. He was kept in this room for six days, during which he was not allowed to see a lawyer, his parents, or any other visitors. *Id.* The court held that the external circumstances of the confession did not so affect the defendant's state of mind that he was induced to confess involuntarily. *Id.* at 898-99.

In the instant case, the voluntariness of Petitioner's confession was considered by a separate court in a *Rasmussen* hearing. The court examined the totality of the circumstances surrounding the confession. The police interviewed Petitioner for a little over an hour. (*Rasmussen* hearing ("R.") at 23.) He was given a beverage and allowed to go to the bathroom (R. at 23.) The record does not indicate intimidation or discourtesy by the police officers. (R. at 23.) Using the preponderance of the evidence standard, the court found that the external circumstances surrounding Petitioner's confession were not coercive. (R. at 23, 27.)

The court recognized that Petitioner's IQ of 77 or 78 placed his intelligence level at borderline mentally retarded. (R. at 19.) Although Petitioner was thirty years old at the time of the offense, he was immature for his age. (R. at 20.) However, the doctrine of diminished responsibility is not applicable in Minnesota, since it contradicts the presumptions inherent in the doctrine of mens rea and inevitably opens the door to variable or sliding scales of criminal responsibility. *State v. Bouwman*, 328 N.W.2d 703, 706 (Minn. 1982), Minn. stat. § 611.025. The statutes provide that a person who is mentally deficient so as to be incapable of understanding the proceedings or making a defense should not be tried or punished for a crime. Minn Stat. § 611.026. Petitioner has never argued that he has this level of mental deficiency. In the *Rasmussen* hearing the court found that Petitioner comprehended the questions and formulated reasonable answers in the police interrogation and in court. (R. at 19-20.) This Court cannot find that a preponderance of

the evidence indicates Petitioner's confession to be other than voluntary. The confession is therefore admissible.

2. The court correctly excluded the testimony of Dr. Kenneth Perkins.

This Court found the issue of whether Petitioner's confession was voluntary to be a matter of law, and that assigning this question to the jury would be error. (Trial transcript at 179.) *Orscanin*, 283 N.W.2d at 901. Petitioner contends that the jury should have heard the testimony of Dr. Kenneth Perkins, not to show that Petitioner's psychological characteristics diminished his capacity to respond to police interrogation, but to allow the jury to properly weigh the reliability of the confession.

Petitioner relies on *State v. Schaeffer*, 457 N.W.2d 194 (Minn. 1990), and *Crane v. Kentucky*, 476 U.S. 683, 106 S. Ct. 2142 (1986). Both courts concluded that if a trial court admits a confession, the court must permit the defense to present evidence on circumstances surrounding the giving of the confession to help the jury determine its weight and credibility. *Schaeffer*, 457 N.W.2d at 196, *Crane*, 476 U.S. at 688, 106 S. Ct. at 2145. The issue is whether the courts referred to the jury's hearing evidence of the defendant's psychological characteristics or to evidence concerning the manner in which the confession was secured.

In *Schaeffer* the court held that the trial court did not err in permitting the defense counsel to elicit evidence that the defendant confessed only after being told a polygraph exam indicated he had lied. *Schaeffer*, 457 N.W.2d at 195. Thus the evidence presented to the jury did not

concern the defendant's psychological characteristics, but the manner in which the confession was obtained by the police. *Id.* at 196.

In *Crane* the sixteen-year-old defendant sought to introduce evidence that, before confessing to a host of local crimes, he had been detained in a windowless room for a lengthy period of time, that during interrogation he was surrounded by as many as six police officers, and that he was repeatedly denied permission to telephone his mother. 476 U.S. at 685, 106 S. Ct. at 2143. The Supreme Court held that "the manner in which the confession was obtained casts doubt on its credibility." *Id.* at 689, 106 S. Ct. at 2146.

Thus neither *Crane* nor *Schaeffer* is properly used to support Petitioner's request to have Dr. Perkins testify as to Petitioner's psychological characteristics in order for the jury to weigh the credibility of his confession. *Crane* and *Schaeffer* refer to a defendant's right to present to the jury evidence of the total circumstances under which the confession was obtained, such as whether there were coercive police tactics that might have elicited a false confession. In Petitioner's case, the manner in which his confession was obtained was appropriately discussed in both the *Rasmussen* hearing and at the jury trial. This Court properly excluded the testimony of Dr. Perkins as unrelated to the manner in which the confession was obtained.

3. Evidence regarding Petitioner's drug usage was correctly admitted for its probative value.

Petitioner asserts that admission of evidence regarding his use of drugs is prejudicial error that constitutes grounds for a new trial. The general test in determining whether evidence is relevant is to ask whether in some degree it advances the inquiry and thus has probative value. *State v. Carlson*, 268 N.W.2d 553, 558 (Minn. 1978). A slight probative tendency is sufficient. Minn. R. Evid. 401, Comm. Cmt. (1977), *Boland v. Morrill*, 270 Minn. 86, 98-99, 132 N.W.2d 711, 719 (Minn. 1965). However, relevant evidence may be excluded if its probative value is "substantially" outweighed by prejudice. Minn. R. Evid. 403, *Carlson*, 268 N.W.2d at 558. To be prejudicial, evidence must be so damaging that there is a reasonable possibility that the verdict might have been more favorable to the defendant if the evidence had not been admitted. *State v. Bolte*, 530 N.W.2d 191, 198 (Minn. 1995). A trial court's admission of evidence of other crimes or bad acts will not be reversed unless abuse of discretion is clearly shown. *State v. Scruggs*, 421 N.W.2d 707, 715 (Minn. 1988).

The Court allowed evidence of Petitioner's drug use for the limited purpose of explaining the totality of the circumstances of the confession, not as a reflection of Petitioner's character. The evidence of Petitioner's drug use was admitted to explain the amount of time consumed on the occasion of the interrogation of Petitioner by the police. The court instructed the jury that Petitioner's drug use could not be seen as pertaining to his

guilt in the sexual conduct charge. There was no intimation that Petitioner was using drugs at the time of the offense. In view of the severity of the charge, there was no reasonable possibility that evidence of Petitioner's drug use was sufficient to affect the outcome of the case. Evidence of Petitioner's drug use was appropriately admitted for its probative value.

B. Sufficiency of the Evidence.

1. Petitioner's request for a jury instruction regarding his theory of the defense was correctly denied.

Petitioner maintains that he was entitled to jury instruction reflecting his theory of the case. At trial he requested an instruction under Minn. Stat. § 634.03 that a confession is insufficient to warrant conviction unless there is other evidence that the offense charged has been committed. It is beyond dispute that a party is entitled to an instruction on his theory of the case if there is evidence to support it. *State v. Coleman*, 373 N.W.2d 777, 781 (Minn. 1985).

However, in the instant case, the Court ruled as a matter of law that evidence other than the confession did exist. The evidence included the witness testimony concerning the scab found in the child's vagina on a night when Petitioner was with the child and when he had scabs on his face from skin graft surgery. Further, the child showed pronounced sexualized behavior for age two and a half. Because of the existence of evidence other than the confession, the court as a matter of law refused to burden the jury with additional instructions.

2. The court correctly denied Petitioner's motion to dismiss for insufficiency of the evidence.

Petitioner contends that the court should have dismissed his case because the evidence in addition to the confession was insufficient. The court as a matter of law considered the evidence sufficient to submit to the jury; the jury considered the evidence sufficient to convict.

To determine whether there is sufficient evidence to support a jury verdict, an appellate court will view the evidence in the light most favorable to that verdict and decide whether the jury could reasonably find the defendant guilty of the crime charged. *State v. Christianson*, 361 N.W.2d 30, 33 (Minn. 1985). There was no appeal filed in the instance [sic] case. This Court continues to hold that sufficient evidence exists that the jury could reasonably find Petitioner guilty of the offense.